

STATE OF VERMONT
HUMAN SERVICES BOARD

In re)	Fair Hearing No. 9906 &
)	10,442
)	
Appeal of)	

INTRODUCTION

The petitioner appeals the termination of her A.N.F.C. benefits as of July 1, 1990 (Fair Hearing No. 9906), and the determination by the Department of Social Welfare that she was overpaid and subject to the recoupment of A.N.F.C. benefits for the period September 1, 1989, through June 30, 1990 (Fair Hearing No. 10,442). The issue is whether the Department has met its burden of proof in either action.

DISCUSSION

These appeals began back in June, 1990, when the board was informed by the Department that the petitioner had orally requested an appeal through the Department's Burlington district office of the Department's decision to terminate her A.N.F.C. grant as of June 30, 1990. On July 10, 1990, Vermont Legal Aid notified the board that it would be representing the petitioner in her appeal. A hearing (Fair Hearing No. 9906) was scheduled in Burlington on August 29, 1990. At the request of the parties, it was continued until September 26, 1990.

At that time the attorneys for the parties informed the hearing officer that criminal charges against the petitioner

related to the issues in her fair hearing were pending, and that the matter should be continued until those charges were resolved. The Department continued to pay benefits to the petitioner throughout the period.

On December 20, 1990, the board sent a letter to the petitioner's attorney stating that the matter would be dismissed unless the petitioner indicated she still wished to pursue the matter. On December 26, 1990, the petitioner's attorney informed the board that he wished the case to remain on the board's docket. On January 17, 1991, the petitioner's attorney requested a status conference.

This conference was held on February 27, 1991. The attorneys for both parties were present. At that time the parties informed the hearing officer that the petitioner had pleaded nolo contendere to a charge of welfare fraud and that the court had ordered her to pay restitution. The Department stated that the "period of fraud" was September 1, 1989 to June 30, 1990, but that there was an issue as to whether the petitioner was eligible for A.N.F.C. from July 1 to August 31, 1990. The Department conceded at that time that the petitioner was eligible for A.N.F.C. as of September 1, 1990. The parties also indicated that there remained to be resolved issues surrounding the Department's recoupment of benefits paid to the petitioner during the so-called "period of fraud"--September 1, 1989 to June 30, 1990. The parties agreed that there was no issue as to

ongoing benefits. Shortly thereafter, the board notified the parties that the matter would not be reset for hearing until further notice. However, the parties were specifically advised to "keep the board informed about the progress of the case." (Memo, March 6, 1991.)

On March 28, 1991, the petitioner's attorney requested a hearing to appeal the Department's decision "assessing an overpayment." Because this appeared to raise a separate issue, the board assigned a new docket number (10,442) and scheduled the matter for Hearing on April 24, 1992. The attorneys for the parties appeared on April 24, 1992 and, in a brief exchange, informed the hearing officer that written memoranda would be submitted in lieu of an oral hearing on the issue of the effect of the petitioner's nolo plea on the Department's decision to recoup A.N.F.C. benefits.

On May 24, 1992, having heard nothing from the parties, the hearing officer notified the petitioner that unless a memorandum was submitted by June 7, 1991, he would recommend dismissal of the matter. On May 28, 1991, the petitioner's attorney responded with the following letter:

I have your memo of May 24, 1991 regarding this case. Contrary to your assertions, my notes as well as my recollections indicate that the Department was going to submit the first Memo in this case, in which an overpayment is alleged, and that the petitioner would be allowed to respond to that Memo. I have been waiting for the Department's Memo since we met on April 24. I have also been waiting for a new notice which the Department said would be sent out.

Following that letter, having heard nothing more, the hearing officer on June 18, 1991, sent the parties a notice

setting the matter for hearing on July 8, 1991. On July 1, 1991, the Department sent the following letter to the board:

Originally it was my understanding (as it was yours) that Tom would be submitting the first memo in this case. However, after speaking with him I believe I am in error. Therefore I am preparing a memo setting forth the Department's position which I expect to have completed by July 8th, the date a hearing in this case has been scheduled.

I am sorry for the confusion. Please keep this case on the schedule. We would hope to have a decision by the August Board meeting.

Shortly before July 8, 1991, the Department asked for a brief extension of time in which to file its memorandum. No hearing was held on July 8th. On July 26, 1991, the hearing officer sent a memo to the parties allowing the Department until August 16th to file its memorandum and giving the petitioner two additional weeks to respond.

Nothing was then heard from either party for several months. On December 17, 1991, the clerk of the board notified the parties that unless there was progress in the case within ten days, the matter would be placed on the dismissal list. On December 23, 1991, the petitioner's attorney responded with the following letter:

This is an appeal brought by [petitioner] to review the decision of the Department to terminate her ANFC benefits. We have been waiting for the Department to file a Memorandum, which the Department requested it be allowed to do last April. The most recent deadline set for this Memorandum was August 16, 1991. We have also been waiting since last April for the Department to send a new notice. The Department's delays make it very difficult for the petitioner to present her case and she will be moving for an order on her behalf because of these delays.

On February 10, 1992, having heard nothing from the

Department, the hearing officer sent the parties the following memorandum:

In light of the Department's continued inactivity in this case, I think a motion by the petitioner for summary reversal would be appropriate.

I will allow the petitioner until February 21, 1992, to file such a motion. If nothing has happened by that date, I will assume that neither party objects to the case being dismissed.

On February 19, 1992, the board received a memorandum from the Department's attorney. On February 21, the petitioner filed a Motion to Dismiss. (It appears to the hearing officer that the petitioner had not received the Department's memo before she sent her Motion to Dismiss.) Copies of both documents follow:

Upon receipt of the above two documents, the hearing officer on March 2, 1992 sent the parties the following memo:

The Department shall have until March 13, 1992, to respond to the petitioner's Motion (dated February 20, 1992). This shall be the final deadline for any and all argument in this matter.

On March 16, 1992, the Department submitted the following memorandum:

On March 23, 1992, the hearing officer sent the following memorandum to the parties:

After reading your memoranda, it appears to me that the issue in Fair Hearing No. 9906 (termination of ANFC as of July 1, 1990) is moot. Please let me know if (and why) either of you thinks it isn't. If the petitioner agrees, can this fair hearing request be withdrawn?

As for Fair Hearing No. 10,422 (the overpayment of ANFC and food stamps from September 1, 1989 through

June 30, 1990), I understand the Department's position to be that its factual burden of proof (that the petitioner was overpaid) is met and cannot be rebutted due to the petitioner's nolo plea to the criminal charge of welfare fraud for this period; and further, that the amount ordered by the court as restitution does not limit the petitioner's liability or the Department's rights concerning the amount of recoupment.

I will allow the petitioner thirty days in which to file a written argument regarding these issues.

Please let me know immediately if you have any questions or concerns.

On April 22, 1992, the petitioner filed the following Supplemental Memorandum:

On May 1, 1992, the hearing officer sent the parties the following Memorandum (emphasis in the original):

I am prepared to recommend that unless the petitioner's conviction for welfare fraud specifically finds that the petitioner "wrongfully obtained" benefits in the amount (\$6,657.00) and for the time (September, 1989 through June 1990) claimed by the Department, the Department cannot invoke 33 V.S.A. § 143(b) as a basis to recoup these benefits. I agree with the petitioner that in light of the Department's delay in moving this case forward, it would be unfair to require the petitioner to defend herself against independent evidence of fraud (as opposed to evidence of the petitioner's conviction for fraud) introduced at this time. However, I will allow the Department until May 15, 1992, to submit to me a copy of the petitioner's conviction for welfare fraud. Failure to submit this evidence by May 15th will result in a recommendation in favor of the petitioner. NO EXTENSIONS!

On May 15, 1992, the Department submitted the following packet of documents:

ORDER

The Department's decisions is reversed.

REASONS

33 V.S.A. § 143 (b) provides:

If the person convicted (of welfare fraud) is receiving assistance, benefits or payments, the commissioner (of D.S.W.) may recoup the amount of assistance or benefits wrongfully obtained by reducing the benefits or payments periodically paid to the recipient, as limited by federal law, until the amount is fully recovered.

The board agrees with the Department that a conviction for welfare fraud based on a plea of nolo contendere does not alter the Department's right under the above statute to recoup benefits that were "wrongfully obtained." As the Department correctly notes, the board has held that the above statute (actually its predecessor, but with essentially identical wording) clearly sets forth an exception to the general rule of law that a plea of nolo contendere does not establish the fact of guilt for any purpose other than that of the case to which it applies.¹ See Fair Hearing No. 4513, supra. Therefore, contrary to the argument advanced by the petitioner, the Department in such cases is not required to produce independent evidence that a recipient was overpaid.

However, the Department is required to establish that there has been an adjudication that the amount of benefits claimed by the Department--in this case, \$6,657.00--was "wrongfully obtained" by the recipient. This, the Department has not done.

Fair Hearing Rule No. 12 provides that "(t)he burden of proving facts alleged as the basis for agency decisions to

terminate or reduce an assistance grant . . . shall be on the agency." In this case, given the provisions of 33 V.S.A. § 143(b), supra, the Department had the simple burden of establishing that the petitioner had been convicted of "wrongfully obtaining "A.N.F.C. benefits in the amount of \$6,657.00. Despite having been given over a year to articulate the basis of its claim, and having been specifically advised by the hearing officer exactly what kind of evidence was needed, the Department has inexplicably--and inexcusably--failed to meet this minimal burden of proof. Other than its own allegations, the Department has offered no evidence establishing that the petitioner was convicted of "wrongfully obtaining" \$6,657.00--the claimed amount of the "overpayment"--leaving the board with no basis, whatsoever, to find or to assume that this was the case.

The documents finally submitted by the Department on May 15, 1992, clearly do not meet this burden. They include only a "probation warrant" signed by the judge that sets the petitioner's "restitution" at \$1,405.50, but contains no other pertinent information as to the dates or the amounts of any benefits "wrongfully obtained" by the Department.²

Also included is an unsigned and undated "Information by State's Attorney" form that only alleges that the petitioner "fraudulently obtained" a certain amount of benefits. Moreover, the amount alleged on this document--\$8,418.00--is different than the amount now sought by the

Department; and there has been no showing that this document is in any way connected to the court's actual adjudication in the matter.

Finally, the Department offered a document from probation and parole that indicates only that the Department told them that restitution should be \$8,418.00 (again, an amount different from that now claimed by the Department). Again, this document does not reveal what the court adjudicated was the amount of benefits "wrongfully obtained" by the petitioner.

As noted above, in all probability a copy of the conviction itself or some related Court document would have clearly and simply provided this information.³ However, at this time, given the number of extraordinarily generous deadlines and the specific instructions already given to, but flouted by, the Department, it would simply undermine the integrity of the hearing process to allow the Department additional time to meet its burden of proof. For this reason, the Department's decision in Fair Hearing No. 10,422, regarding the recoupment of any amount over the \$1,405.50 ordered by the Court as restitution, is reversed.

From the Department's memorandum filed March 16, 1992, supra, it appears that it concedes that the petitioner was eligible for A.N.F.C. as of July 1, 1990. Inasmuch as the Department has offered no evidence of the petitioner's ineligibility for this period, the decision in Fair Hearing No. 9906, terminating the petitioner's A.N.F.C. as of June

30, 1990, is reversed.

FOOTNOTES

¹See 29 Am Jur 2d ¶ 703.

²It does not appear that the petitioner contests her liability to repay (and to have deducted from her ongoing benefits) an overpayment of \$1,405.00--the amount ordered by the court as "restitution" to the Department.

³Without such "proof," however, the Department cannot rebut the petitioner's claim that the court intended that the amount ordered as "restitution"--\$1,405.50--be considered the amount "wrongfully obtained" by the petitioner. It might also be the case (though in the two years this case has been pending the Department has not alleged it) that the court records of the petitioner's conviction are silent as to the actual amount of benefits "wrongfully obtained." If this is the case, the Department cannot avail itself of 33 V.S.A. § 143 (b), and would have had to produce independent evidence of the amount of overpayment and the fact that these benefits were "wrongfully obtained" by the petitioner. As noted above, however, the allowable time for this has long passed.

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